

IN RE: NATIONAL FOOTBALL  
LEAGUE PLAYERS' CONCUSSION  
INJURY LITIGATION

MDL No. 2323

THIS DOCUMENT RELATES TO:  
NFL PARTIES' OBJECTIONS TO  
DIAGNOSES MADE OUTSIDE THE  
BASELINE ASSESSMENT PROGRAM

This matter requires the Special Master to determine whether the NFL Parties may object to the Special Master’s determination that Qualifying Diagnoses made outside the Baseline Assessment Program (“BAP”) were supported by medical evidence “generally consistent” with the criteria set forth in the Settlement Agreement. For the reasons stated below, the Special Master holds that the rulings on these appeals were not predicated on conclusions of law, and thus the NFL Parties may not object.

The Special Masters must decide an appeal of a Monetary Award based on a showing by the appellant of clear and convincing evidence that the determination of the Claims Administrator was incorrect. (“Order Appointing Special Masters,” filed July 13, 2017, at 5.) “Clear and convincing evidence” is a recognized intermediate standard of proof—more demanding than preponderance of the evidence, but less demanding than proof beyond a reasonable doubt. *In re Fosamax Alendronate Sodium Prods. Liab. Litig.*, 852 F.3d 268, 285-86 (3d Cir. 2017) (“Black’s Law Dictionary defines clear and convincing evidence as ‘evidence indicating that the thing to be proved is highly probable or reasonably certain.’”).

The NFL Parties object to denial of its appeals of six Monetary Awards based on the sufficiency of the medical evidence supporting the claimants' Qualifying Diagnoses, all of which were made outside of the BAP. Diagnoses made outside of the BAP must be based on evidence "generally consistent" with the diagnostic criteria set forth for Qualifying Diagnoses made within the BAP (Settlement Agreement at Ex. A, "Injury Definitions".) The NFL Parties argue that these six claims were not supported by evidence generally consistent with the diagnostic criteria, and thus the Monetary Awards should have been denied.

## DISCUSSION

The parties to the settlement agreed and the Court directed that the “factual determinations of the Master(s) on...appeal will be final and binding.” (“Order Appointing Special Masters,” at 5.) Pursuant to Fed. R. Civ. P. 53(f)(4), the Court must review *de novo* any objection to the Special Master’s conclusions of law. (*Id.*) The parties also agreed that the “Special Masters will identify in each decision any issue the Special Master determines to be a conclusion of law to which a party to the appeal may object and have it reviewed by the court.” (“Rules Governing Appeals of Claim Determinations,” Rule 31.) The NFL Parties did not object to this Rule.

In all six of the appeals at issue, the Special Master did not identify a conclusion of law. Each of the Special Master’s determinations clarified that the Special Master’s decision is a factual determination and is final and binding. The Special Master found that each of these appeals involved conclusions of fact, because the appeals required the Special Master to apply the undisputed factual circumstances of each case to a legal standard – “generally consistent” – that was clearly established by the parties to the Settlement Agreement.<sup>1</sup> According to FAQ 95 on the Settlement Website, a Qualifying Diagnosis is supported by evidence that is “generally consistent” with the relevant diagnostic criteria if the evidence “ha[s] more elements or characteristics in common” with the diagnostic criteria than “elements or characteristics that differ” from the criteria.<sup>2</sup>

Based on this definition, when an appeal of a Monetary Award turns on the sufficiency of the medical support for the Claimant’s Qualifying Diagnosis, the appellant must prove clearly and convincingly that there are more differences than commonalities between the medical evidence supporting the Qualifying Diagnosis and the Settlement Agreement’s diagnostic criteria. The Special Master denied the six appeals at issue because the NFL Parties failed to meet this standard of proof in light of the factual circumstances on the record in each case.

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<sup>1</sup> See Randall H. Warner, *All Mixed Up about Mixed Questions*, 7 J. APP. PRAC. & PROCESS 101, 113-14 (2005) (“Cases often equate law interpretation with the application of fact to law, and therefore conclude that law application is a question of law. This is sometimes true, but not always...[L]aw application may just involve taking an established, undisputed legal standard and deciding whether the undisputed facts of this case fall within the standard. This...exercise does not involve law interpretation.”). Warner notes that clarifying the meaning of a legal standard involves a question of law, while applying the standard to the facts of a case is for the trier of fact. See *id.* at 133 (quoting *Harris v. Parker College of Chiropractic*, 286 F.3d 790, 794 (5th Cir. 2002) (“Challenges to a district court’s finding of hostile work environment and constructive discharge are typically treated as factual questions.”)).

<sup>2</sup> See *Settlement Website FAQs*, “FAQ 95: What does ‘generally consistent’ mean?” (available at <https://www.nflconcussionsettlement.com/FAQ.aspx>). FAQ 95 also states that “[t]he common elements or characteristics [between the medical evidence and the diagnostic criteria] must predominate over the uncommon ones.” The primary dictionary definition of “predominate” is “to hold advantage in numbers or quantity.” *Predominate*, Merriam-WEBSTER.COM (2018), available at <https://www.merriam-webster.com/dictionary/predominate>. FAQ 95 thus makes explicit that the “generally consistent” standard requires that the commonalities between the diagnostic criteria and the evidence supporting the Qualifying Diagnosis outnumber the differences.

Under Fed. R. Civ. P. 53(f)(4), the Special Master must defer to the Court's interpretation of the "generally consistent" standard. However, based on the definition of "generally consistent" set forth in FAQ 95, the Special Master concludes that the six appeals at issue fail to establish by clear and convincing evidence that there are more differences than commonalities between the medical support for the Qualifying Diagnoses and the relevant diagnostic criteria.

Therefore, based on the Special Master's conclusion that the definition of "generally consistent" in FAQ 95 is the correct standard, the Special Master holds that the rulings on the six appeals by the NFL Parties did not involve conclusions of law, but evaluations of fact against a legal standard that was clearly defined by the parties. The NFL Parties have thus exhausted the review process afforded by the Settlement Agreement with respect to these claims.

### **CONCLUSION**

For the reasons stated above, the NFL Parties may not object to the determinations of the Special Master.

Date: October 18, 2018

  
Wendell E. Pritchett, Special Master